No. 13,075

United States Court of Appeals
For the Ninth Circuit

FRED BENIOFF, Bankrupt,
Appellant,

vs.

BURTON J. WYMAN, Referee in Bankruptcy, and JOHN O. ENGLAND, Trustee in Bankruptcy,
Appellees.

BRIEF OF APPELLEE, JOHN O. ENGLAND, TRUSTEE IN BANKRUPTCY.

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Table of Authorities Cited

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ARGUMENT.

The bankrupt's motions to transfer the hearing on the trustee's objections to the bankrupt's discharge (R. 1-11) and all other proceedings (R. 33-43) from Referee Burton J. Wyman were made pursuant to the provisions of Section 22 of the Bankruptcy Act, Title 11, U.S.C.A. Section 45, Subsection (b), which reads:

> "The judge may at any time for the convenience of parties or for cause transfer a case from one Referee to another."

It may be noted in appellant's brief, his opening statement incorrectly states the substance of the fore-

going statute in that he states "a Referee may be removed for cause." (Appellant's Brief p. 6, line 3.)

The bankrupt's petition sets out specifications of alleged evidence of personal bias and prejudice on the part of the Referee. (R. 2-10.) A discussion of the specifications with reference to the transcript will be made hereinafter.

Remington on Bankruptcy, Vol. 2, page 71, states:

> "Facts should be stated which tend to show personal bias or prejudice with the same fullness as would be required under the Federal statute providing for the disqualification of judges."

The federal statute referred to is 28 U.S.C.A., 144. The cases hold that the provisions of Section 144 must be strictly complied with by the moving party. *Skirvin v. Mesta,* 141 F. (2d) 668; *Scott v. Beams,* 122 F. (2d) 177; *Allen v. DuPont,* 75 Fed. Supp. 546. Also see *U. S. v. Costea,* 52 Fed. Supp. 3, which holds:

> "This section was not intended to enable one clearly guilty of the offense charged to secure imposition of sentence by another judge whom he believes might impose a lighter sentence, and judge has no right to evade his official duty by voluntarily withdrawing on accused's request."

It is apparent from the record in the case at bar that the request to transfer made by the bankrupt is frivolous and not made in good faith since the bankrupt has made no previous move to have his general examination or other proceedings under the

Section 21-A examination transferred, whereas one of the specifications (No. 1) (R. 2) charges an act of personal bias and prejudice to the Referee prior to the institution of the instant voluntary proceedings—the others follow shortly thereafter. It is obvious that the atmosphere the bankrupt has created by his actions, his testimony and his refusal to cooperate with the trustee in bankruptcy cause him to now want the matter of his discharge heard by a different Referee, believing that he will possibly get his discharge by having the matter heard de novo, so to speak. In other words, the situation in *U. S. v. Costea,* supra, fits the instant situation perfectly.

In this case the appellant bankrupt has not only permitted proceedings to be had in connection with the bankruptcy from May 1, 1950, to the date of the filing of his petitions to disqualify Referee Wyman, but during that period numerous adversary proceedings have been had other than a 21-A examination, namely, (1) the question determined adversely to the bankrupt and over his objections for the appointment of a receiver during the pendency of his Chapter XI proceeding, from which no review was taken; (2) the adjudication of the debtor, a bankrupt, over his objections from which order no review was taken; and (3) the adversary proceeding involving the bankrupt appellant's petition to amend his schedules in bankruptcy denied by the Referee from which no review was taken.

It is also of importance that in connection with appellant's view of the law in which appellees agree,

that in arriving at the interpretation and application of 11 U.S.C.A. 45(b), the application and interpretation of 28 U.S.C.A. 144 must be complied with. In this connection appellant did not file an affidavit of personal bias and prejudice accompanying his petitions to the district judge, nor was there any certificate of good faith filed by his counsel.

There are few cases involving the transfer of a cause from the Referee to whom it has been assigned to another Referee, and those cases seem quite limited in their application. The rule apparently being that instead of removal, unless a clear case of personal bias and prejudice is made out, the party allegedly aggrieved always has his right of review. See *Fish v. East,* 44 ABR(NS) 252, U.S.C.C.A., Tenth Circuit, June 29, 1940, in which case the Court said:

> "The referee is not a judge within the meaning of Section 1(20) of the Bankruptcy Act, 11 U.S. C.A., P1(20), and of P21 of the Judicial Code, 28 U.S.C.A., P25. The referee is an officer of the Bankruptcy Court appointed and removable only by the judge of the United States District Court. P 1(22) and P 34(1), Bankruptcy Act, 11 U.S. C.A., PP 1(22), 62(1). The District Judge may also at any time for cause transfer a case from one referee to another. P 22, sub. (b), Bankruptcy Act, 11 U.S.C.A., P 45, sub. (b). There appears to be no rules either of said district, or in the rules of civil procedure, or in the general orders, relating to the removal or disqualification of referees. A party aggrieved by an order of the referee may file a petition for review. Sec-

tion 39, subs. (a)(10), (c), Bankruptcy Act, 11 U.S.C.A., P 67, subs. (a)(10), (c)."

In the case at bar the district judge has already reviewed the charges made by the appellant seeking the transfer of the cause for personal bias and prejudice from Referee Wyman to some other Referee (R. 61), and unless a serious abuse of discretion exists on the part of the district judge, his findings on the facts must be deemed conclusive. We submit that no abuse of discretion on the part of the district judge is apparent from the record.

Mr. Justice Lurton, in *Ex parte American Steel Barrel Co.,* 230 U.S. 35, 33 S. Ct. 1007, 1010, 57 L. Ed. 1379, said:

> "The basis of the disqualification is that 'personal bias or prejudice' exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which made be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause."

And again at p. 182:

> "(3) Nor does the court feel impelled to ask the referee to refuse to proceed further in this

matter, for it is commonly said that a judicial officer against whom an insufficient showing for recusation has been made owes it to his oath of office and to the litigant who invokes the jurisdiction of his court over which he presides not to withdraw from the case, however much his personal feeling may incline him so to do."

We desire to call the Court's attention to the fact that *Ex Parte American Steel Barrel,* supra, was cited with approval by the Supreme Court in *Berger v. U. S.,* 255 U.S. 22, 41 S. Ct. 230, 65 L. Ed. 481, cited by appellant. (Appellant's Brief pp. 6 and 20.)

See:

Benedict v. Seiberling (D.C.), 17 F. (2d) 831;
In re McFerren, 5 Fed. Supp. at p. 181, District Court, E.D. Illinois, Aug. 29, 1933.

Also see:

DeRan v. Killits, 8 Fed. (2d) 840:

"A party who has been attorney for the bankrupt and consented to an adjudication in bankruptcy cannot have the judge disqualified where he asquiesced for years in disregard of his affidavit of disqualification instead of challenging the order striking the affidavit when made during which time the administration of bankrupt estate actively proceeded."

See also:

Laughlin v. U. S., 151 F. (2d) 281;
Refior v. Lansing Drop Forge Co., 124 F. (2d) 440, certiorari denied, 316 U.S. 371.

What must an affidavit or a petition alleging personal bias and prejudice on the part of the judge or referee contain?

> "An affidavit of personal bias or prejudice based only on the judge's comments on questions of law affecting the sufficiency of the indictment and continuance based upon assumption that the allegations and the indictment were true did not meet requirements and will be stricken out of this section."
>
> *U. S. v. Foster,* 81 Fed. Supp. 280.

> "Affidavits of personal bias or prejudice of trial judge filed under that section must be strictly construed so that such affidavit must state facts showing personal bias or prejudice of judge against the affiant."
>
> *Sanders v. Allen,* 58 Fed. Supp. 417.

The attempt by the bankrupt to disqualify the Referee from hearing the specfications in objection to his discharge filed by the trustee (R. 1-11) was filed approximately one year after the institution of proceedings by the bankrupt under Chapter XI of the Bankruptcy Act. There was an immediate reference of those proceedings to the present Referee. It is submitted that the affidavit of prejudice for the removal alleging personal bias and prejudice as filed herein was not made timely.

In the nine alleged specifications of evidence of personal bias and prejudice on the part of Referee Wyman set up as they appear in the petitions to transfer said cause to another Referee filed by the appel-

lant with the District Court (R. 2-10), we have the following observations to make.

In the first place, with the exception of two of these alleged specifications, all took place and were part of open Court proceedings. One took place (Specification No. 1) (R. 2) prior to the institution of the above proceedings in the United States District Court, and the other (Specification No. 5) (R. 5) likewise does not appear in the record. Directing ourselves for the moment strictly to those that appear in the record, we are unable to find any quoted testimony by appellant that would indicate personal bias and prejudice on the part of the Referee toward the bankrupt appellant. It is apparent by a reading of the transcript of the proceedings before the Referee in Bankruptcy, particularly on the day and dates to which reference has been made by appellant, that the Referee was highly tried at all stages of the proceedings by not only the bankrupt, but by the Mr. Weinblatt referred to in appellant's brief, and by all the other witnesses who testified on the general examination who had formerly been either employed by or associated with said bankrupt in business directly or through the Arnold Best Co.

In connection with the excerpt from the testimony referred to in appellant's Specification No. 2, of his petition (R. 3), taken from the Referee's transcript of May 29, 1950, lines 14 to 21 at page 62, we refer to that portion of the transcript commencing at line 18, page 57 to line 21, page 62, of the transcript

of the same date, from which it will be apparent that no prejudice or bias has been shown.

With reference to Specification No. 3 of appellant's petition for removal (R. 3), the statements charged to the Referee are in the first place comments on the evidence. Mr. Benioff on the day those statements were made, which by their very nature are not directed to him or about him, was not even in Court. See Referee's transcript of June 7, 1950, page 84. We likewise refer the Court to the testimony of that day offered by one William E. Blaskower, the then president of Arnold Best Co., commencing page 92 of the Referee's transcript of June 7, 1950, and particularly the language of Mr. William Klein, line 15, page 118, of the Referee's transcript of the same date.

Mr. William Klein, who at that time was counsel for the bankrupt, therein stated:

> "Pardon me. May I respectfully state this: From the man's testimony it definitely appears he was never an officer of the Arnold Best Company, never had a nickel invested; he was made President by a couple of the directors. Chances are he was never even at a meeting, never at a directors' meeting since he came back from Europe; he has never been at a directors' meeting. He never had any actual connection with the company. All these facts are manifest from his testimony.
>
> The Referee. It is quite manifest there is something radically wrong with the Arnold Best Company * * *"

Then follows the remaining portion of the quotation by the appellant. (R. p. 3, last 5 lines.) We fail to see where there is anything showing in this statement of alleged personal bias or prejudice by the Referee against the bankrupt. It is the ordinary comment that any judge, having heard the testimony preceding, and in the light of counsel's statement, would have made.

In connection with Specification No. 1 of the bankrupt's petition for removal (R. 2), and the words attributed to Referee Wyman in the colloquy that allegedly occurred between the bankrupt and the Referee subsequent to the adjournment of Court, and taking into account the proceedings and charges of possible violation of the criminal provisions of the Bankruptcy Act had in Court on May 2, 1950, in the matter of Arnold Best Company, a corporation, an alleged bankrupt, No. 38692, pending in the United States District Court for the Northern District of California, Southern Division, which charges at that time were not controverted, and for that matter have never been controverted, the remark attributed to the Referee, if made, was only normal and was made as a result of the information and facts divulged at the preceding hearings. Likewise, it was only normal for the Referee before whom the matter was pending not to desire to discuss the case out of Court with any of the participants in the proceedings.

With reference to the 4th specification of the bankrupt's petition to transfer (R. 4), the excerpt is taken from page 153 of the Referee's transcript of testimony

of June 29, 1950, commencing line 3, and for a full understanding of the Referee's remarks we respectfully refer the Court to the Referee's transcript commencing line 17, page 149 of the transcript of June 29, 1950, through line 23, page 153.

The notes referred to were notes accepted by creditors under the 5-year plan proposed by debtor as his arrangement under Chapter XI, some of these creditors having been paid off by one Abe I. Weinblatt, a representative of the debtor, in varying amounts or given promises and guarantees, and it was for that reason that the remarks of the Referee were made as to a possible violation of the Bankruptcy Act by the debtor or his representatives.

The debtor, the appellant herein, clearly violated the provisions of United States Code Title XI, Chapter 11, Section 337, in that before the proposed arrangement had been accepted pursuant to the provisions of the Section, he had distributed the consideration to the creditors either directly or through Mr. Weinblatt, as the Referee's transcript of June 29, 1950 showed, and otherwise conducted himself in complete disregard of the provisions of the Bankruptcy Act, and to that end the remarks attributed to the Referee at that time were proper to ascertain to what extent and in what manner creditors had received their consideration before the approval and acceptance of any plan and before the deposit of the necessary funds in accordance with Section 337, supra, to pay priority creditors and expenses of administration. There is nothing in the remarks of the Referee quoted

by appellant from the transcript of the foregoing date that was in any way indicative of personal bias or prejudice by the Referee against the bankrupt.

If the colloquy attributed in Specification No. 5 of the bankrupt appellant's petition for removal (R. 5) took place there still is nothing in the alleged colloquy that shows personal bias or prejudice against the bankrupt. It merely involved an appraisal by the Referee, to which he is entitled, of the testimony of Mr. Abe I. Weinblatt.

With reference to Specification No. 6 of the petition (R. 5-8) we respectfully again submit the transcript preceding the portion lifted from the testimony of Mr. Weinblatt by the appellant, which commences line 21, page 182 to line 2, page 184, of the Referee's transcript of July 10, 1950, for a complete understanding of the Referee's remarks. These remarks were furthermore not directed to the bankrupt, or against the bankrupt, but were in connection with the examination of Abe I. Weinblatt. Again we refer to the portion of the Referee's transcript referred to in the petition (R. commencing line 23, page 6), which appears in the transcript of the same date, line 18, page 198 to line 2, page 200 of said transcript. For a clear understanding of the remarks quoted we respectfully refer the Court to the testimony of the Referee's transcript of that date, line 12, page 195 to line 2, page 200, which can show no personal bias or prejudice, but gives the background for the Referee's remarks.

Again the appellant, bankrupt, in his Specification No. 7 of his petition (R. 8), bodily lifts a portion of the Referee's transcript. In this connection we refer to the entire colloquy between counsel and the Referee in the Referee's transcript of July 19, 1950, commencing line 11, page 203 to line 70, page 211. The items of the Referee's transcript referred to have been taken from page 207 of the transcript of July 19, 1950, lines 6 to 11, and then the following portions of the transcript are skipped until we arrive at line 7, page 208 and it is quoted then to line 17, page 208. There is nothing in the transcript referred to by appellant in the remarks of the Referee that indicate any personal bias or prejudice on the part of the Referee against appellant.

In reference to Specification No. 8 of the petition (R. 8), the excerpt of the Referee's transcript quoted is taken from page 16, of the transcript of November 2, 1950, line 18, to line 16 of page 18. For a full understanding of the statements of the Referee in that connection, may we refer the Court to the transcript specifically of that date and to the entire preceding transcript of the bankrupt and debtor's prior testimony, the testimony of that date commencing with the Referee's transcript of November 2, 1950, line 3, page 2, and continuing to line 10, page 17. In this connection it is submitted that it is the duty of the referee as well as counsel for the trustee, and the trustee, where there is reasonable cause to believe that the bankrupt has violated any of the criminal provisions of the Bankruptcy Act to refer the matter

to the U. S. Attorney's office and to the Federal Bureau of Investigation. (Title 11 U.S.C.A. 52.) The remarks of the Referee were made pursuant to his duties as such Referee, and could not possibly be construed as personal bias and prejudice.

It may be noted that counsel on page 11, lines 5 and following of his brief, admits that his Specifications Nos. 4, 5, 6 and 7 of his petition are specifications "turning about the witness" Weinblatt. If it were true, which it is not, that the Referee was personally biased or prejudiced against Mr. Weinblatt, who is not a party to the proceedings other than as a witness called by the trustee under Section 21-A of the Bankruptcy Act, just how that could be construed as personal bias and prejudice against the bankrupt is beyond our comprehension.

With reference to Specification No. 9 set forth in the petition (R. 10), no copies of letters, no names of creditors, have been set forth and it is well settled law that the appointment of a receiver is a matter of discretion with the Court. (11 U.S.C.A. Sec. 725-726.) No review was taken from the order made.

Appellant has cited numerous cases in his brief. In *Whitaker v. McLean,* C.A.D.C., 118 F. (2d) 596, the Court likewise said:

> "a bias which develops during the trial and is 'grounded on the evidence' has been held not to be within the terms of Section 21, *Craven v. U.S.,* 1 Cir., 22 F. (2d) 605, certiorari denied, 627, 48 Sup. Ct. 321, 72 L. Ed. 739. Often some degree of bias develops inevitably during a trial. Judges

> cannot be forbidden to feel sympathy or aversion for one party or the other. Mild expressions of feeling are as hard to avoid as the feeling itself."

The instant case, as distinguished from the cases cited by appellant, is not the case of the trier or hearer of the facts passing on the affidavit of personal bias and prejudice against himself as has been the case in practically all of the Federal and United States Supreme Court cases cited by appellant, but is the case of an appeal from a decision of an impartial judge, the Honorable George B. Harris, presiding District Judge, on the petitions alleging personal bias and prejudice and on the record presented to him which, in effect, is the same record presently before this Court. See the case of *J. P. Linahan, Inc.,* 138 Fed. (2d) 650, cited by appellant, for an excellent discussion of what constitutes personal bias and prejudice. A reading of the case of *Craven v. United States,* 22 Fed. (2d) 605, shows it to be in effect very similar to the instant appeal in that the charges of personal bias and prejudice were termed by the Circuit Court of Appeals, First Circuit, "frivolous".

Appellee therefore urges that upon an analysis of all of the circumstances of alleged personal bias and prejudice on the part of the Referee, four of the specifications of personal bias and prejudice charged to the Referee were remarks not directed at the appellant, the bankrupt, but against the witness Weinblatt; two were made by the Referee in connection with his duties as prescribed by the Bankruptcy Act, and the

three remaining upon analysis and a review of the preceding and following portions of the Referee's transcript of the record, are clearly demonstrated as not being based on personal bias or prejudice, but were the normal remarks any Court or judge would have made under similar circumstances.

We respectfully submit that the order of the District Court appealed from should be affirmed.

Dated, San Francisco, California,
October 24, 1951.

Respectfully submitted,
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